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OLC 78-0408
26 January 1978

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MEMORANDUM FOR: [REDACTED]
SA-D/DCI/IC

FROM : [REDACTED]
Assistant Legislative Counsel

SUBJECT : Principles Paper on Intelligence Charter
Legislation

1. (C) Attached is a copy of the charter legislation principles paper which Mr. George Cary and I mentioned at our meeting this morning. The Director has reviewed it and we think it would be useful to circulate it at tomorrow's charter meeting in the context of developing a coordinated position on charter principles for review by the NSC Special Coordinating Committee. Such a paper then could form the basis for working with the SSCI to reach agreement between the Committee and the Administration on the principles that should be followed in legislating intelligence charters.

2. (C) We might, of course, want to add something more about other individual agency charters as well as perhaps a little more detail on restrictions and the collection and use of information on U.S. persons.

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Attachment:
As Stated

Distribution:
Orig - Addressee
1 - OLC Subject w/att
1 - OLC Chron w/o/att

1 - Acting DDCI w/att
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INTELLIGENCE CHARTER LEGISLATION PRINCIPLES

Overall Framework

The primary goal of the charter legislation should not really be different from that behind enactment of the National Security Act of 1947, viz., to provide for a centralized mechanism to coordinate and manage the Government's intelligence needs and capabilities--the Central Intelligence Agency--under the overall direction of a single person--the Director of Central Intelligence--with what might be termed "cross-bureaucracy" authorities and responsibilities. It is not now--in 1978--so much a problem of the existing intelligence charter having become obsolete, inappropriate or unworkable; rather, it is a question of reaffirming the needs and general principles embodied in the National Security Act of 1947 and, to a degree, of "filling the gaps."

Within this framework, it is not necessarily inappropriate to address in the legislation certain restrictions or limitations on intelligence activities; the redraft of Executive Order 11905 does this and the Administration appears committed to the concept of publicly enunciating certain limits on intelligence activities. Problems arise, however, when efforts are made to legislate detailed grants of positive authority, or to mandate restrictions that by reasonable interpretation overlap necessary and appropriate intelligence activities.

Excessive detail in legislation clogs the machinery of Government processes and tends to bring about results not intended by:

- heightening the probability that a particular activity not proscribed either by the letter or spirit of law will be found unauthorized merely for want of a specific statutory authority to conduct it; and

- leading to an undesirably cautious mentality tending to freeze all action, regardless of how desirable or proper, which does not fit precisely within the dead center of a grant of authority.

The Government's intelligence capability, contingent in large part as it is on anticipating events largely beyond the control of the United States, must remain sufficiently flexible to respond to fast-breaking situations and challenges abroad. Even less so than in other areas of Governmental concern can the mandate--to gather and provide important intelligence to policy makers and to carry out intelligence activities

at the direction of the policy makers--be carried out with any degree of effectiveness if every act is subject to detailed requirements as to whether the activity falls within specific parameters, and if most, if not all, activities are subject to detailed post-activity reporting and justification requirements.

One overriding principle that must be borne in mind is that intelligence officers and employees must be able to guide their actions according to the charter in a reasonable and not overly burdensome manner; the mandate must be workable. There should be clear general authorities and responsibilities as well as clear and reasonable limitations.

Moreover, efforts to legislate requirements that certain activities must be considered in a particular manner or that numerous specific factors must be taken into account in implementing an activity raise problems of interpretability and tend to be unmanageable in practice. For example, a statutory provision that would require that certain factors be "carefully considered" or "fully expressed" before an authorized activity could be implemented could, without stretching the language unreasonably, raise subjective arguments that, despite the fact that the activity itself was authorized, the required conditions precedent were not met. Such requirements, while perhaps appropriate for inclusion in an Executive Order, which is inherently concerned with the give-and-take of inter-departmental responsibilities, could give rise to debilitating disputes.

Executive Order

Insofar as substantive issues are to be addressed in both the draft Executive Order and in the charter, it should be our position that the treatment of such issues not be in conflict. This guideline would be particularly applicable, for example, in specifying the authorities and responsibilities of the Director and of the Central Intelligence Agency, and in providing the mechanism--though not in equal detail--whereby special activities and sensitive collection operations are reviewed, approved and implemented.

Broad Responsibilities

The Director of Central Intelligence--or the Director of National Intelligence according to the draft legislation with which we have been working--should be clearly identified as the principle intelligence officer of the Government. The charter should provide, as among its purposes, that necessary intelligence shall be collected and made available to policy makers in the Executive Branch; although reference to the intelligence "needs" of the Legislative Branch would not be inappropriate, such a "responsibility" should not be co-equal with the Executive Branch duties. The statute should specify that the Director shall head the CIA.

The authorities and responsibilities relating to all aspects of the collection, production and dissemination of intelligence should run to the Director of National Intelligence. Insofar as characterization of intelligence as "national," "tactical" or "departmental" tends to be artificial and temporal, such distinctions should be avoided to the greatest extent possible; the same would hold, for example, as to distinctions between "national intelligence activities" and "intelligence activities." The Director should have responsibility for counterintelligence activities abroad and, within the United States under the direction of the Attorney General. The Director of National Intelligence's coordination authorities should run clearly to all intelligence liaison activities and to the collection of intelligence abroad. The Director should be responsible for ensuring implementation of special activities. Collection of foreign intelligence from sources within the United States from public or voluntary sources should also be specifically granted.

The enumeration of the Director of National Intelligence's duties and responsibilities should be clear grants of positive authorities, and should comprise the broadest parameters; the authorities and responsibilities of the CIA would include many of these, again as positive grants, but not all.

CIA Responsibilities

The Agency should have its own statutory identity and mission and, therefore, despite the fact that the Director of National Intelligence would head the Agency and would have enumerated authorities, the statute should include a compilation of Agency authorities and responsibilities, in addition to the "infrastructure" and implementing requirements as embodied in the CIA Act of 1949, as amended. The Executive Order should provide the guide for the necessary authorities and responsibilities of the Agency. There would be no need to provide separately for an office or a particular individual to head the Agency; the Director, however, must have implicit or explicit authority to delegate his authorities in order to provide for the appropriate management of the Agency.

Deputies to the DNI

The statute should provide the necessary authority to allow the Director to appoint either a specified number--probably four--or up to a certain number--probably four or five--subordinate officers to assist him and to whom he may delegate his authorities. These might be entitled "Assistant Directors" or "functional Deputy Directors," without further specification of their duties or areas of responsibility.

Budget and Fiscal Responsibilities

The Director's responsibility for developing, coordinating and approving the intelligence budget should be commensurate with that directed in Presidential Decision/NSC-17 and as reflected in the Executive Order. The charter should specifically grant to the DNI full and exclusive authority for approval (rather than, for example, "preparation") of the National Foreign Intelligence Program budget, and it should be stipulated that the DNI should provide guidance for program and budget development to program managers and heads of component activities involved in the NFIP. In addition, the DNI should have full and exclusive authority within congressional guidelines for reprogramming NFIP funds, and for the utilization under appropriate congressional and Executive guidelines of the CIA Contingency Reserve. The Director should retain his "unvouchered funds" authority.

Any provision in the charter for GAO review of Agency and/or DNI activities should be limited to financial (as opposed to "program management") audit and review, and only through the intelligence oversight committees. Also, there should be provision for exempting certain expenditures from GAO review.

Special Activities and Sensitive Collection Operations

The primary concerns in this matter should be to keep to an absolute minimum the proliferation of sensitive information, to avoid a cumbersome review and approval procedure, and to avoid ambiguous or arbitrary characterizations of activities or operations. The Executive Order should be used as a guide in this regard.

Restrictions and Limitations

Probably the most difficult substantive areas to legislate will be delimiting restrictions on intelligence activities, and the authorities to collect and utilize information on U.S. persons. Restrictions generally should track those in the Executive Order, and the language should avoid legislating ambiguous restrictions, such as references to "democratic governments." Furthermore, care should be taken to ensure that all activities be in accordance with U.S. laws and not any other laws. Restrictive provisions should not preclude appropriate activities conducted by the Foreign Resources Division (regarding foreign persons in the U.S.) and the Domestic Collection Division (regarding contacts with U.S. persons), or by other Agency components in the course of normal contacts with U.S. persons and organizations.

Collection, use and dissemination of information on U.S. persons should be addressed as in the Executive Order, and should avoid artificial limitations that, for example, could be construed to prohibit the use of information for law enforcement purposes.

Reporting to the Congress

The charter should specify that the DNI shall be the primary adviser to the Congress (though, as noted above, not on a co-equal footing with the responsibilities to the Executive), including responsibility to provide substantive intelligence products under procedures to ensure protection of sources and methods.

The basic reporting responsibility should be as provided in the Executive Order. If the charter is to include, in addition, requirements for reporting to the Congress on particular activities or categories of activities (e.g., reprogramming or Contingency Fund withdrawals), these should not be subject to precise time limitations nor should the Director have to report on a frequent basis. In short, the reporting requirements should not be so oppressive as to vitiate the very capabilities otherwise authorized.

Sources and Methods

Support for sources and methods legislation has yet to be resolved; at a minimum, however, the charter legislation should contain the sources and methods authority contained in the existing statute.